

5 May 2023

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Investment Managers, Financial Services and Wealth
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

By email: im.sunsettingconsultation@asic.gov.au

Dear ■■■■■■■■■■

Consultation Paper 369: Remaking ASIC class orders on platforms: [CO 13/762] and [CO 13/763]

1. The Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) thanks the Australian Securities and Investments Commission (**ASIC**) for the opportunity to respond to ASIC Consultation Paper 369 *Remaking ASIC class orders on platforms: [CO 13/762] and [CO 13/763]* (the **Consultation Paper**).
2. The Committee also thanks ASIC for granting a short extension of time to lodge this response.

Background

3. The Consultation Paper proposes that ASIC will remake the following legislative instruments, without significant changes:
 - (a) Class Order [CO 13/762] *Investor directed portfolio services provided through a registered managed investment scheme (Class Order 13/762)*; and
 - (b) Class Order [CO 13/763] *Investor directed portfolio services (Class Order 13/763)*.
4. These class orders are due to expire on 1 October 2023. ASIC is proposing to replace these class orders with new legislative instruments with an expiry date of 1 October 2028.

Class Order 13/762

5. The Committee agrees with ASIC's proposal to remake Class Order 13/762.

6. The Committee is not aware of any significant issues with the operation of the class order.
7. However, the Committee has noticed the following differences between Class Order 13/762 and the draft legislative instrument set out in Attachment 1 to the Consultation Paper, for which no explanation was given in the Consultation Paper.
8. Firstly, the following paragraphs which form part of Class Order 13/762 have not been included in Attachment 1:
 - (a) paragraph 5, which reads:

“A responsible entity of an IDPS-like scheme and each other person involved in the preparation of a Product Disclosure Statement for an interest in the scheme cannot rely on paragraph 4 if ASIC has given a notice in writing to the responsible entity or the person stating that the responsible entity or the person may not rely on that paragraph and has not withdrawn the notice.”; and
 - (b) notional subsection 704B(3) of the *Corporations Act 2001* (Cth) (the **Corporations Act**), which provides:

“(3) A person cannot rely on subsection (2) if ASIC has given a notice in writing to the person stating that it cannot rely on that subsection and has not withdrawn that notice.”
9. The Committee submits that it would be appropriate for ASIC to explain why Attachment 1 differs from Class Order 13/762 in these respects, and how the different approach would impact a responsible entity relying on the relief set out in Attachment 1, as distinct from the relief set out in Class Order 13/762.
10. Secondly, the Committee notes that the definition of “financial assets” in notional subsection 1013DAB(19) of the Corporations Act differs as follows:

Class Order 13/762 definition	Attachment 1 definition
<i>financial assets</i> has the same meaning as that term has in paragraph 11 of Accounting Standard AASB 132 <i>Financial Instruments: Presentation</i> as in force on 28 June 2013 and as amended from time to time by a disallowable legislative instrument within the meaning of the <i>Legislation Act 2003</i> .	<i>financial assets</i> has the same meaning as that term has in paragraph 11 of Accounting Standard AASB 132 <i>Financial Instruments: Presentation</i> as in force on the day this instrument is made.

11. The Committee submits that ASIC should articulate its rationale for taking a different approach in Attachment 1 and explain any consequences this might have for responsible entities relying on the relief in the form of Attachment 1.
12. Finally, the Committee notes that in Attachment 1, notional subparagraph 1013DAB(8)(b)(ii) of the Corporations Act no longer states “for acquisitions after 31 December 2017” before “subsection (8G) is satisfied”. The Committee considers this

difference to be self-explanatory, as the requirement in notional subsection 1013DAB(8G) is now operative.

Class Order 13/763

13. The Committee agrees with ASIC’s proposal to remake Class Order 13/763.
14. The Committee is not aware of any significant issues with the operation of the class order.
15. However, the Committee has noticed the following differences between Class Order 13/763 and the draft legislative instrument set out in Attachment 2 to the Consultation Paper, for which no explanation was given in the Consultation Paper.
16. Firstly, the following paragraphs which form part of Class Order 13/763 have not been included in Attachment 2:
 - (a) paragraph 5, which reads:

“An operator of an IDPS cannot rely on paragraph 4 if ASIC has given a notice in writing to the operator stating that the operator may not rely on that paragraph and has not withdrawn the notice.”;
 - (b) notional subsection 704A(3) of the *Corporations Act 2001* (Cth) (the **Corporations Act**), which provides:

“(3) A person cannot rely on subsection (2) if ASIC has given a notice in writing to the person stating that it cannot rely on that subsection and has not withdrawn that notice.”; and
 - (c) paragraph 13, which reads:

“A person cannot rely on paragraphs 10 or 11 if ASIC has given a notice in writing to the person which states that the person cannot rely on the paragraphs and has not withdrawn the notice.”
17. The Committee submits that it would be appropriate for ASIC to explain why Attachment 2 differs from Class Order 13/763 in these respects, and how the different approach would impact an investor directed portfolio service (**IDPS**) operator relying on the relief set out in Attachment 2, as distinct from the relief set out in Class Order 13/763.
18. Secondly, the Committee notes that the definition of “financial assets” in notional subsection 912AD(42) of the Corporations Act differs as follows:

Class Order 13/763 definition	Attachment 2 definition
<p>financial assets has the same meaning as that term has in paragraph 11 of Accounting Standard AASB 132 <i>Financial Instruments: Presentation</i> as in force on 28 June 2013 and as amended from time to time by a disallowable legislative instrument</p>	<p>financial assets has the same meaning as that term has in paragraph 11 of Accounting Standard AASB 132 <i>Financial Instruments: Presentation</i> as in</p>

Class Order 13/763 definition	Attachment 2 definition
within the meaning of the <i>Legislation Act 2003</i> .	force on the day this instrument is made.

19. The Committee submits that ASIC should articulate its rationale for taking a different approach in Attachment 2 and explain any consequences this might have for IDPS operators relying on the relief in the form of Attachment 2.
20. Thirdly, the Committee notes that in Attachment 2:
 - (a) notional subsection 912AD(26)(b)(ii) of the Corporations Act no longer states “for acquisitions after 31 December 2017” before “subsection (26G) is satisfied”.; and
 - (b) notional subsection 912AD(5) no longer seeks to impose different fee and costs disclosure requirements based upon whether an IDPS Guide was given before 30 September 2022.
21. The Committee considers these differences to be self-explanatory, as compliance with notional subsection 912AD(26G) and notional subsection 912AD(5) is now mandatory.
22. On a separate note, the Committee also wishes to bring to ASIC’s attention that, as a consequence of IDPS operators being exempt from the whole of Part 7.9 of the Corporations Act under Class Order 13/763, the provisions of section 1017E of the Corporations Act with respect to dealing with application moneys do not apply to an IDPS operator.
23. The Committee submits that exempting an IDPS operator from section 1017E causes IDPS operators to be treated differently to other product issuers, and that there is a consumer protection gap if IDPS operators are not required to comply with the section 1017E requirement to hold application moneys in trust.
24. ASIC may therefore wish to consider this point in the course of remaking Class Order 13/763.

Incidental matters

25. The Committee notes that, since Class Order 13/762 and Class Order 13/763 were made, there have been changes to the Corporations Act with respect to the use of electronic methods of delivering documents. It is not clear to the Committee whether ASIC has considered whether any provisions of these class orders relating to electronic methods of document delivery might now be sufficiently dealt with by existing provisions of the Corporations Act. The Committee submits that any unnecessary inconsistency between the existing provisions of the Corporations Act and these legislative instruments with respect to electronic methods of delivery should be avoided.
26. The Committee recommends that ASIC make a technical update to Regulatory Guide 148 *Platforms that are managed investment schemes and nominee and custody services* when the new legislative instruments are made, to replace references to

Class Order 13/762 and Class Order 13/763 with references to the new legislative instruments.

27. If ASIC has any questions or would like to further discuss with any matters raised in this submission with the Committee, please do not hesitate to contact [REDACTED] Chair of the Financial Services Committee [REDACTED]

Yours faithfully

